

In the Matter of:	:	
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<b>Mortgage Capital of America, Inc.,</b>	:	HUDBCA No. 04-D-NY-EEO32
	:	Claim No. 7-207007680A
Petitioner	:	
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**DECISION AND ORDER ON RECONSIDERATION**

Petitioner, Mortgage Capital of America, Inc., filed a timely motion for reconsideration of the Decision and Order issued in this matter on March 23, 2005 which held “that the debt which is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the Secretary . . . [and authorized the Secretary] to seek collection of this outstanding obligation by means of administrative offset of any federal payments due to Petitioner.”

Petitioner asks for reconsideration only as to its first claim, which is that HUD made a material misrepresentation concerning the ownership of the subject property (“Marty property”) in August 1999. In its Decision and Order, the Board found that “Petitioner . . . failed to submit any documentary evidence to dispute HUD’s statement that it never owned the subject property [and] [t]herefore, Petitioner’s claim that HUD induced MCA into signing the indemnification agreement through the use of a material misrepresentation must fail for lack of proof.” (Decision and Order dated March 23, 2005). Petitioner claims that the Board’s finding

overlooks evidence in the record that establishes  
(1) that HUD acquired ownership of the Marty

property in August 1999, and (2) that HUD had not only *acquired* the Marty property, but had also *resold* the Marty property by the time Patrick Liao, Director of HUD's Quality Assurance Division, represented to MCA that HUD had never owned the property, but had only insured the loan. Emphasis in original. (Motion for Reconsideration filed April 20, 2005, hereinafter "Mot. For Recon.," ¶ II.).

In support of these allegations, Petitioner has submitted a copy of HUD's records for FHA case number 092-6983449, attached to the Declaration of Glenn Goodman. (See Mot. For Recon., Exh. C, Declaration of Glenn Goodman).

### **Discussion**

This Board has previously held that:

Reconsideration is discretionary with the Board and will not be granted in absence of compelling reasons, e.g., newly discovered material evidence or clear error of fact or law. See Paul Dolman, HUDBCA No. 99-A-NY-Y41 (November 4, 1999); Anthony Mesker, HUDBCA No. 94-C-CH-S379 (May 10, 1995); William G. Grammer, HUDBCA No. 88-3092-H607 (March 7, 1988); 24 C.F.R. § 17.152 (d). It is not the purpose of reconsideration to afford a party the opportunity to reassert contentions that have been fully considered and determined by the Board. See Seyedahma Mirhosseini, (Mr./Mrs.), HUDBCA No. 95-A-SE-S615 (January 13, 1995); Paul Doman, supra.; Charles Waltman, HUDBCA No. 97-A-NY-W196 (September 21, 1999); Louisiana Housing Finance Agency, HUDBCA No. 02-D-CH-CC006 (March 1, 2004) at 1.

The Board grants reconsideration only as to the material misrepresentation issue.

Petitioner argues that it should not be bound by the indemnification agreement on the grounds that it was induced by a misrepresentation of a material fact by the Government. Petitioner alleges that it would have never agreed to sign the indemnification agreement had it known that HUD had acquired the Marty property in August 1999 and then resold it to a third party.

Except for Petitioner's assertion, there is no documentary evidence to corroborate Petitioner's statement, that it would have never agreed to sign the indemnification agreement had it known that HUD had previously acquired the Marty property and resold

it to a third party, is true. Petitioner's assertion is not evidence that the debt is not enforceable. Assertions without evidence are not sufficient to show that the debt claimed by the Secretary is not past-due or enforceable. Bonnie Walker, HUDBCA No. 95-G-NY-T30 (July 3, 1996). Petitioner further alleges that Patrick Liao's statement that HUD never owned the Marty property is in direct contradiction to evidence in the record, which shows that HUD did acquire the property prior to Petitioner signing the indemnification agreement, and therefore constitutes a material misrepresentation.

To prove misrepresentation, Petitioner must show that a representative of HUD erroneously misrepresented a material fact and that Petitioner reasonably relied on that misrepresentation to its detriment. T. Brown Constructors, Inc. v. Pena, 132 F.3d 724, 729, (Fed. Cir. 1997); Philadelphia Indemnity Insurance Company v. Margaret Kohne and Segun Amuchienwa, 294 F.Supp. 2d 1319, 1328; Morris v. United States, 33 Fed. Cl. 733, 745 (1995).

The Board finds that Petitioner has submitted sufficient documentary evidence to prove that Patrick Liao, Director of HUD's Quality Assurance Division did inaccurately state, in response to an inquiry by a representative of MCA, that HUD had never owned the subject property.

In this case, Petitioner signed the agreement to indemnify HUD for its loss after FHA insured loan 092-6983449 had already defaulted, and HUD had already completed the resale of the secured property. The agreement contains no explicit provisions that required HUD to offer the property to Petitioner, to convey the property to Petitioner, or to provide Petitioner with an opportunity to purchase the property before selling it to a third party. Nor does the agreement provide an exception to Petitioner's obligation to indemnify HUD for its losses if HUD owned the property prior to the date of the agreement. Under the terms of the indemnification agreement, HUD was not required to sell the subject property to Petitioner after the borrower defaulted on the loan. The Board has previously found that such an "indemnification agreement gave HUD the right to decide whether to sell the property to a third party or convey the property to Petitioner." First Millennium Mortgage Corp., HUDBCA No. 04-K-CH-EE023 (September 22, 2004) citing Indigo Mortgage Services, Inc., HUDBCA No. 04-K-CH-EE021 (November 3, 2004) citing First Millennium Mortgage Corp.

The language in section 1(b) of the indemnification agreement does not require HUD to sell the property to Petitioner. The agreement states that: "conveyance of the property will be accepted by MCAI and indemnification will be made to HUD for its investment." (Dillon Decl., Exh. A). (emphasis added). This language, per se, does not require HUD to convey the property to Petitioner as it has argued, but merely underscores the parties' agreement that Petitioner will not contest "conveyance of the property" by HUD to any party. Moreover, the pertinent language at paragraph 1(c) of the indemnification agreement, which states: "Where . . . the property has been sold by HUD to a third party . . .," emphasizes HUD's right to sell the property to any "third party." Even if HUD did not own the subject property in August 1999 and had not sold it to a third party, as represented, once Petitioner signed the indemnification agreement, HUD

could have purchased the property and still refused to sell it to Petitioner and could have instead sold it to a third party. Petitioner's signing of the indemnification agreement did not give it the right of first refusal with regard to the purchasing of the Marty property.

Except for Petitioner's assertion, there is no documentary evidence to corroborate Petitioner's claim that Liao's statement about the Marty property constitutes a material misrepresentation. Petitioner's assertion is not evidence that the debt is not enforceable because of a material misrepresentation by HUD. While Liao's statement that HUD never owned the Marty property was incorrect, I do not find his statement to be material, nor do I find that Petitioner's reliance on his statement to be detrimental. As a result, Petitioner has failed to satisfy the factual predicates for the application of misrepresentation.

### **ORDER**

Petitioner's argument and documentary evidence does not alter the Board's Decision and Order issued in this matter on March 23, 2005, which held "that the debt which is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the Secretary . . . [and authorized the Secretary] to seek collection of this outstanding obligation by means of administrative offset of any federal payments due to Petitioner." Accordingly, upon reconsideration, the Board affirms the earlier decision.

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Jerome M. Drummond  
Administrative Judge

September 19, 2005